IN THE SUPREME COURT OF MISSISSIPPI
No. 2015-FC-01317-SCT

ROBERT SWINDOL — APPELLANT

v.

AURORA FLIGHT SCIENCES CORPORATION — APPELLEE

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PROPOSED AMICUS BRIEF OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN OPPOSITION TO REHEARING

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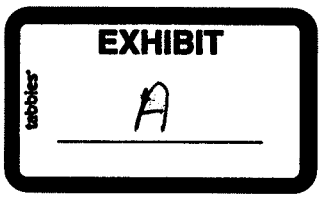

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INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is America's foremost and oldest defender of the fundamental right to keep and bear arms. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a vital interest in the outcome of this proceeding, since this Court's interpretation of MISS. CODE § 45-9-55 will affect the thousands of NRA members who reside in Mississippi, and since the NRA actively supported the passage of Mississippi's law and others like it. *See, e.g.*, NRA-ILA, *Governor Barbour Signs Castle Doctrine, Other NRA-Backed Gun Provisions Into Law!*, Mar. 26, 2006, *available at* https://goo.gl/6442wb.

ARGUMENT

It is a first principle of this State's constitutional order that the Legislature has undoubted "authority to enact a statute that abrogates the common law." *Maranatha Faith Ctr., Inc. v. Colonial Trust Co.*, 904 So. 2d 1004, 1007 (Miss. 2004). Accordingly, while the courts of this State have long adhered to the common law rule of at-will employment—that "an employee may be discharged at the employer's will for good reason, bad reason, or no reason at all," *Shaw v. Burchfield*, 481 So. 2d 247, 254 (Miss. 1985)—that judge-made rule has coexisted alongside a constitutionally necessary limitation. "[T]he harshness of the terminable at will rule is subject to exception in light of express legislative action," *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 875 (Miss. 1981), and the employer's authority to terminate its employees for whatever reason it chooses does not extend to "reasons independently declared legally impermissible," *Shaw*, 481 So. 2d at 254.

In the opinion Appellee Aurora Flight Sciences Corp. ("Aurora") asks this Court to reconsider, the Court correctly concluded that MISS. CODE § 45-9-55 is precisely the type of

"express legislative action" contemplated by this line of cases. The Legislature's command that no employer "establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle" parked on company property, *id.* § 45-9-55(1), declares in clear and certain terms that an employee's exercise of that right is not a legally permissible reason for discharge. This Court drew the only conclusion from these words that *can* be drawn: they constitute a legislatively crafted "exception to the employment at will doctrine." Opinion at 10 (Mar. 24, 2016) (quotation marks omitted). A failure by the courts to honor that exception would brazenly contradict the Legislature's unquestionable power, within constitutional limits, to abrogate the common law in furtherance of its sound view of public policy.

Aurora, along with the organizations that have filed an amicus brief supporting it, the Mississippi Economic Council, Mississippi Municipal League, and Mississippi Manufacturers Association (collectively, "MEC"), attempt to undermine this conclusion in two ways.[1] First, Amicus MEC argues that while this Court's cases do permit the Legislature to declare exceptions to the at-will rule, they allow it to do so only by granting employees a *statutory private right of action* to sue for discharge. Second, both Aurora and MEC also contend that the Legislature's power to partially abrogate the at-will rule is subject to another (possibly alternative) limitation: it may declare certain reasons for discharge to be "legally impermissible" only if it subjects discharge based upon such reasons to *criminal penalty*.

[1] As an initial matter, we note that MEC did not seek to participate in this case until after Aurora's motion for rehearing, and it does not explain why it failed to make the arguments it now seeks to press when this Court was initially considering the certified questions, or why this Court should now allow it to be heard for the first time. Whether MEC should be permitted to participate at this late date is entirely within this Court's discretion, and the Court would be fully justified in declining to entertain MEC's arguments at all.

Both of these arguments share a similar, fatal flaw: they seek to shackle the Legislature's power to abrogate the common-law doctrine of at-will employment with judge-made limitations. That is not the law. The Legislature does not need to invoke some magical passcode when it wants to create an exception to the at-will doctrine, and it also does not need to independently create a private cause of action or provide for criminal penalties in order to do so. The case law imposes no such limitations on the Legislature's power to declare certain reasons for discharge to be legally impermissible, nor, given the constitutional principles of separation of powers and legislative supremacy, could it.

Finally, even if Aurora and MEC were correct that Section 45-9-55 does not *of its own force* create an exception to the at-will doctrine, this Court should do so. As *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603 (Miss. 1993), itself illustrates, this Court has authority to modify the common-law at-will-employment rule in light of the fundamental public policy of this State. And the constitutional declaration that the right to keep and bear arms "shall not be called in question," MISS. CONST. art. 3, § 12, and Section 45-9-55's emphatic protection of that right in this very context, demonstrate a public policy of the most fundamental sort against discharging employees for exercising that right.

I. This Court Correctly Held That Section 45-9-55 Makes the Exercise of the Rights It Grants a Legally Impermissible Reason for Discharging an Employee.

While the common law in this State provides an employee a remedy for unlawful discharge by his employer, that remedy has long been cabined by the rule of at-will employment: "absent an employment contract expressly providing to the contrary, an employee may be discharged at the employer's will for good reason, bad reason, or no reason at all." *Shaw*, 481 So. 2d at 254. In the 1980s, there was a concerted, nationwide effort to modify this traditional rule, and many States responded by creating a broad "public policy" exception to the at-will doctrine. *See generally* Note, *Protecting Employees At Will Against Wrongful Discharge: The Public*

Policy Exception, 96 HARV. L. REV. 1931 (1983). In a trio of landmark cases, this Court declined to abandon the at-will rule and also declined to adopt a general public-policy exception; but it did conclude that the at-will doctrine was limited in a few other important ways. *See Kelly*, 397 So. 2d 874; *Shaw*, 481 So. 2d 247; *McArn*, 626 So. 2d 603. Most significantly, it emphasized in each case that the at-will rule was "subject to exception in light of express legislative action," *Kelly*, 397 So. 2d at 875, that "independently declared" certain reasons for discharge "legally impermissible," *McArn*, 626 So. 2d at 606 (quoting *Shaw*, 481 So. 2d at 254). For "[i]n order to preserve the separation of powers set forth in Article 1, Section 1 of the Mississippi Constitution of 1890, it is essential that the judicial department give effect to the acts of the legislative department as long as those acts are expressed in constitutional terms." *Kelly*, 397 So. 2d at 877.

Amicus MEC offers a revisionary reinterpretation of the "express legislative action" limitation on the at-will rule that this Court has so carefully preserved. That limitation, it says, has always been understood as merely "a reference to statutes which themselves contain private rights of action." Br. of Amici Curiae Mississippi Economic Council, Mississippi Municipal League, and Mississippi Manufacturers Ass'n Supporting Request for Rehearing at 5 (Apr. 7, 2016) ("MEC Amicus"). Put differently, this Court's insistence that the at-will rule does not encompass discharge for reasons "independently declared legally impermissible," MEC says, refers to the Legislature's power to provide "a *separate* way to sue an employer through a statute providing a private right of action. It has never been a way to sue an employer *through* a common law wrongful discharge claim." *Id.* But the scant evidence MEC gives for this theory fails to support it; and the principles of separation of powers that undergird the exception indicate that it must mean precisely what this Court's cases say it means: the Legislature can declare certain reasons for discharge legally impermissible, and it needn't create a private right of action to do so.

MEC attempts to prise support for its novel reading of the "declared legally impermissible" limitation on the at-will rule from *Kelly* and from *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25 (Miss. 2003). Neither offers any. In *Kelly*, this Court declined to craft an exception to the general rule of at-will employment for "retaliatory discharge" of an employee who files a claim for Workers' Compensation. "Our Workmen's Compensation Law," the Court reasoned, "does not contain a provision for retaliatory discharges, nor does it contain a provision making it a crime for an employer to discharge an employee for filing a claim." 397 So. 2d at 876. Accordingly, "[i]f we create the remedy sought by plaintiff in this case, we would thereby engraft on the law an exception different from that expressed by the Legislature," and that "is not the function of the judicial department." *Id.* Instead, *Kelly* emphasized that "the harshness of the terminable at will rule is subject to exception in light of express legislative action." *Id.* at 875.

To be sure, *Kelly* also reasoned that "the absence of explicit statutory provision of a civil remedy in the Mississippi workmen's compensation statute *argues against* recognizing a cause of action for retaliatory discharge." *Id.* (emphasis added). But a closer look at *Kelly*'s reasoning—and, in particular, its justification for not following the cases from other States that *had* found an exception to the at-will doctrine for retaliatory discharge—shows that *Kelly* hardly viewed the "explicit statutory provision of a civil remedy" as a *sine qua non* of "express legislative action" abrogating the at-will rule.

Kelly recognized that several other States had found an "exception to an employer's right to discharge an employee at will when the right is exercised in retaliation for the employee asserting his rights under a workmen's compensation act." *Id.* But it declined to look to those cases for guidance because "the statutes in each of [those] states contain sanctions against discharging employees for filing claims for workmen's compensation benefits." *Id.* Importantly,

however, while those out-of-State statutes may have "sanctioned" retaliatory discharge, they did not uniformly *create a private right of action* for such discharge. *See, e.g.*, *id.* at 875 n.1; *Brown v. Transcon Lines*, 284 Or. 597, 604 (1978) (en banc) ("We do not mean to say that . . . plaintiff's cause of action must be based upon or implied from [the compensation statute itself]."). Had *Kelly* viewed the existence of a private right of action as the key dividing line, then, it *could not have distinguished these cases*.

Nor does this Court's decision reaffirming *Kelly* in *Buchanan* get MEC any further. MEC suggests that under *Buchanan* the absence of a statutory right of action must be dispositive because it declined to recognize an exception to at-will employment for retaliatory discharge under the Workers' Compensation Act even though, MEC says, "[t]he Act makes it 'legally impermissible' for an employer to prevent an employee injured on the job from filing a worker's compensation claim." MEC Amicus 8. But whatever MEC means by this naked assertion, it is clear that the Workers' Compensation Act nowhere prohibited retaliatory discharge—and indeed, the absence of any "provision for retaliatory discharges" was one of the *basic premises* of the decision in *Kelly*. 397 So. 2d at 876.

MEC also relies on the Northern District of Mississippi's decision in *Berg v. Weyerhaeuser Co.*, 1995 WL 1945457 (N.D. Miss. Aug. 10, 1995), but that opinion cannot bear the weight MEC would place on it. Even if *Berg* had precedential weight on this point of Mississippi law (which it does not, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71–80 (1938)), it *does not even mention* the presence or absence of a private right of action in the statute that the plaintiff there urged had created an exception to the at-will doctrine.

MEC's reliance on *Shaw* is also misplaced. MEC urges that *Shaw*'s discussion of the "declared legally impermissible" limitation supports its view because "*Shaw* was decided before *McArn*, which means that, at the time, there were no common law exceptions whatsoever to the

at-will employment doctrine." MEC Amicus 6. But regardless of the existence of *judge-made* exceptions to the at-will rule, the authority of *the legislature* to declare exceptions was well established before *Shaw*, by *Kelly*'s holding that the at-will rule was "subject to exception in light of express legislative action." 397 So. 2d at 875.

The utter lack of support in this Court's cases for limiting the Legislature's power to declare exceptions to the at-will rule should come as no surprise, given the separation-of-powers principles that undergird that authority. "The power of the Legislature as the immediate representatives of the people is supreme," *State ex rel. Forman v. Wheatley*, 113 Miss. 555, 74 So. 427, 432 (1917) (en banc), and for that reason "[t]he provisions of the common law . . . are subject to modification by the Legislature," *Pickering v. Langston Law Firm, P.A.*, 88 So. 3d 1269, 1278 (Miss. 2012). The courts, by contrast,

> have no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would be intrenching upon the power of the legislature. Neither have the courts authority to write into the statute something which the legislature did not itself write therein, nor can they ingraft upon it any exception not done by the lawmaking department of the government. Whenever the judiciary shall undertake to violate these rules indeed, we may say maxims then it is guilty of usurpation in its most obnoxious form; and the courts dare not do this lest they destroy their own usefulness and power.

Kelly, 397 So. 2d at 877 (quoting *Hamner v. Yazoo Delta Lumber Co.*, 100 Miss. 349, 56 So. 466, 490 (1911)). MEC urges this Court to usurp the legislative power in just this way. This Court's cases since *Kelly* have made plain that the employment-at-will bar to a common-law unlawful discharge claim is "subject to exception in light of express legislative action." 397 So. 2d at 875. The Legislature, at this Court's long-standing invitation, has taken such action in enacting Section 45-9-55. This Court has no authority to ignore that plain legislative declaration because the Legislature did not *in addition* create *a separate, statutory* private right of action.

This link between the "express legislative action" limitation recognized since *Kelly* and the Mississippi Constitution's separation of powers also shows why Aurora and MEC are wrong

to suggest that this Court's opinion will lead to a "wave of litigation," Appellee's Mot. for Rehearing at 5–6 (Apr. 7, 2016) ("Rehearing Mot."), by "crafty lawyers who seek to pursue traditional federal law claims through this Court's newly created state court vehicle," MEC Amicus 7. As just shown, the limitation on the at-will bar that the Court applied in its opinion here flows directly from the authority of *this State's legislature* "to enact a statute that abrogates the common law," *Maranatha Faith Center*, 904 So. 2d at 1007, and from the principle that "*the legislature* . . . declares the public policy of the State and its declaration is final as far as the courts are concerned," *Golding v. Armstrong*, 231 Miss. 889, 900, 97 So. 2d 379 (1957) (emphasis added). The United States Congress, by contrast, does not define the public policy *of this State*, *see McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 289 (Pa. 2000), and while, under the Supremacy Clause, it can *preempt* that public policy if it so chooses, it must make its intention to do so "clear and manifest," *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002). There is thus no reason to fear that the recognition, in the opinion challenged here, of the *Mississippi Legislature's* authority to declare certain reasons for discharge to be legally impermissible will lead to a flood of litigation under *federal* employment law.

These same separation-of-powers considerations dispose of the suggestion by both Aurora and MEC that the Legislature can exercise its authority to create exceptions to the at-will rule only by making the conduct in question subject to *criminal* penalty. Because "the two existing exceptions" to the at-will doctrine created in *McArn* "require the presence of criminal conduct," Aurora argues that the "express legislative action" limitation should also be so limited, and that this Court's opinion thus strikes "in an unexpected new direction" by recognizing an exception "for violation of this civil statute." Rehearing Mot. 4; *see also* MEC Amicus 8 n.6. But neither Aurora nor MEC cites any authority for limiting the Legislature's power to abrogate the

at-will rule in this way; and indeed, it is entirely unclear where such a limitation could come from. As noted above, "[t]he power of the Legislature as the immediate representatives of the people is supreme." *Wheatley*, 74 So. at 432. And that is just as true when it enacts civil prohibitions as criminal ones.

In any event, violating Section 45-9-55 *likely is* a criminal offense, by way of MISS. CODE § 99-19-31. That statute provides that "[o]ffenses for which a penalty is not provided elsewhere by statute . . . shall be punished by fine of not more than one thousand dollars ($1,000.00) and imprisonment in the county jail not more than six (6) months." Aurora earlier argued that this provision "cannot apply to Section 45-9-55" because that Section "is not found in the Mississippi Criminal Code." Appellee's Rule 28(K) Letter Br. Re *Robert Swindol v. Aurora Flight Servs. Corp.* at 2 (Oct. 5, 2015). But Section 99-19-31 *on its face* is not so limited; and indeed, the Attorney General has concluded that the violation of another employment-related statute—MISS. CODE § 47-1-19, which is *also* not codified in the Criminal Code—"may be punished pursuant to Section 99-19-31." Office of the Attorney General, Opinion No. 2000-0142, 2000 WL 530441, at *1 (Mar. 17, 2000), *available at* https://goo.gl/eWTQIz; *see also Dupree v. Carroll*, 967 So. 2d 27, 31 (Miss. 2007) ("While an attorney general's opinion is not binding on this Court, it is persuasive . . . .").

II. Even if Section 45-9-55 Does Not Create an Exception to the Employment-At-Will Doctrine of Its Own Force, this Court Should Itself Create Such an Exception.

Finally, even if Aurora and MEC were correct that Section 45-9-55 does not amount to "affirmative legislative action" creating an exception to the at-will doctrine, this Court should exercise its common-law authority to create such an exception itself, based on the fundamental public policy purposes behind Section 45-9-55 and Article 3, Section 12 of the Mississippi Constitution.

The Constitution of this State unequivocally declares that "The right of every citizen to keep and bear arms in defense of his home, person, or property . . . shall not be called in question . . . ." MISS. CONST. art. 3, § 12. And whatever else it does, Section 45-9-55's demand that employers "may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area," surely reflects the Legislature's solemn judgment that employees' rights to keep and bear arms for self-defense required additional safeguards. In enacting Section 45-9-55, then, the Legislature established the public policy of this State, and this Court should similarly exercise its undoubted authority to "declare[ ] . . . public policy exceptions to the age old common law rule of employment at will." *McArn*, 626 So. 2d 607.

The Legislature was correct to find that policy considerations counsel strongly in favor of protecting the rights of employees to store firearms in their locked vehicles. From 2004 to 2008, over 400,000 non-fatal violent crimes were committed in parking lots and garages nationwide. *See Location*, BUREAU OF JUSTICE STATISTICS, http://goo.gl/LRkzjF. Indeed, in 2008 alone, approximately 178,000 non-fatal violent crimes were perpetrated upon victims who were commuting to or from work. *See* BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES, tbl. 64 (Mar. 2010), *available at* http://goo.gl/ILxJeL. Moreover, there is evidence that the action the Legislature took to safeguard employee's constitutional rights had a real impact. From 2003 to 2005, there were an average of twelve occupational shooting homicides a year in the State; after the enactment of Section 45-9-55, from 2007 to 2010, that average dropped to six. *See State Occupational Injuries, Illnesses, and Fatalities*, BUREAU OF LABOR STATISTICS, http://goo.gl/amWaoZ (click on files for each year to see annual data).

But as this Court recognized, the existence of some remedy for employees whose rights under Section 45-9-55 have been nakedly violated is necessary to give those rights any meaning at all. *See* Opinion 13–14. Unless employers who ignore Section 45-9-55's commands may be sued by the employees whom they have illegally discharged, that provision will be an empty form of words. To the extent this Court concludes that Section 45-9-55 does not of its own force abrogate the at-will doctrine, then, it should itself craft an exception to that doctrine to ensure that the Legislature's actions are not entirely meaningless.

Creation of an exception to the at-will rule in this context would be consistent with this Court's precedents. In *McArn* itself, for example, this Court created two narrow "public policy exceptions to the age old common law rule of employment at will," allowing suits for wrongful discharge where "(1) an employee . . . refuses to participate in an illegal act" and where "(2) an employee . . . is discharged for reporting illegal acts of his employer." 626 So. 2d at 607. Moreover, *McArn* implied that further exceptions might also be appropriate. *Id.* And in *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539 (Miss. 1996), this Court extended the *McArn* exceptions to allow the award of punitive damages, reasoning that "[t]he public has a legitimate interest in seeing that people are not discharged for reporting illegal acts or not participating in illegal acts which may result in harm to the public interest," and that punitive damages were appropriate "in order to deter similar future conduct." *Id.* at 543. So to here: an exception to the at-will-employment rule is appropriate and necessary because of the public's strong interest in securing the right to keep and bear arms and not seeing Section 45-9-55 violated by employers without consequence.

CONCLUSION

For these reasons, this Court should deny Aurora's Motion for Rehearing.

Dated this the 14th day of April, 2016.

Respectfully submitted,

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This the 14th day of April, 2016.

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